

TITLE 326 AIR POLLUTION CONTROL BOARD

LSA Document #07-351

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from January 21, 2009, through February 20, 2009, on IDEM's draft rule language. IDEM received comments from the following parties:

Alliance of Automobile Manufacturers	(AAM)
Consumer Specialty Products Association	(CSPA)
Improving Kids' Environment	(IKE)
Personal Care Products Council	(PCPC)
SchiffHardin, LLP	(SH)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: Improving Kids' Environment, Inc. (IKE) is fully supportive of IDEM's proposal to adopt this rule, which has been identified by the Lake Michigan States as one of a package of rules that will address regional emissions of ozone precursors. These numerous and ubiquitous products, which include personal care, household, automotive and many other items, emit volatile organic compounds (VOC) that contribute to regional ozone formation. Many of these chemicals are also toxic and may have adverse impacts on public health. With a number of Indiana counties measuring air quality in excess of the federal ozone standard and given that Indiana's emissions contribute to air quality in downwind states, all reasonable measures should be taken to reduce Indiana's VOC emissions.

The rule is a great example of pollution prevention, because it restricts the VOC content of the products themselves rather than controlling the emissions afterwards. Implementation and compliance assurance is therefore straightforward for manufacturers, retailers and regulators. IKE supports IDEM's use of the Ozone Transport Commission (OTC) model rule, which other states are using as well. This kind of program must be uniform throughout the country, given the regional and national nature of the markets for these products.

IKE agrees that IDEM should move forward with this rule now. When and if U.S. EPA undertakes amendments to the current federal rule (which are likely to be consistent with the OTC rule in any event), the Indiana Air Pollution Control Board can consider any appropriate changes.

IKE has two questions about the draft rule:

1) What percentage of VOC inventory do these products represent and what is the VOC

reduction impact expected to be once this rule is implemented?

2) The notice says that the draft rule is “primarily based on the OTC model rule.” What are the specific differences? (IKE)

Response: IDEM recognizes the importance of addressing the ozone issue from a regional perspective. This rulemaking, in conjunction with the rulemakings conducted by the other LADCO states, will assist in controlling VOCs in order to ensure compliance with U.S. EPA’s newly issued 8-hour ozone standard and the proposed revised standard currently under consideration.

When U.S. EPA amends the existing federal consumer and commercial products (CCP) rule (40 CFR Part 59, Subpart C), IDEM will amend the state CCP rule, if necessary. However, to date, U.S. EPA has not published their proposed revisions to the federal consumer and commercial products rule.

Regarding IKE’s questions about this rulemaking:

1) What percentage of VOC inventory do these products represent and what is the VOC reduction impact expected to be once this rule is implemented?

The federal CCP rule limits the VOC content of 24 product categories, or approximately 48 percent of the CCPs inventory nationwide. U.S. EPA estimates that VOC emissions from those 24 product categories are reduced by 20 percent. Since over half the inventory is unregulated by the federal rule, the OTC developed the model rule to regulate additional CCP categories and have more stringent VOC content limits than the federal rule. The emission reductions for the OTC model rule are estimated to be 14.2 percent of the total consumer product inventory beyond the national rule reduction. Indiana estimates an incremental emissions reduction of 3,154 tons per year of VOC beyond the reductions achieved from the federal rule.

2) The notice says that the draft rule is “primarily based on the OTC model rule.” What are the specific differences?

The majority of changes to the OTC model rule were formatting changes in order to comply with Indiana’s requirements for administrative rules. Additionally, IDEM did not include the following provisions from the OTC model rule: the variance provision (section 8); individual state approval of the Alternative Control Plan (ACP) or the innovative products exemption; optional state-specific certification procedures for charcoal lighter materials; the VOC content limits for toilet and urinal care products; and the ban on para-dichlorobenzene (PDCB) in solid air fresheners and toilet or urinal care products.

The OTC model rule variance provision was unnecessary because Indiana’s variance procedures are statutorily prescribed and apply to all rules adopted by the Air Pollution Control Board. Indiana’s statutory variance provisions can be found in the Indiana Code §13-14-8-8. The model rule’s language regarding individual state approval of the ACP or innovative products exemption and state-specific certification procedures for charcoal lighter materials were not included because Indiana determined that it is not necessary to require the department to make these determinations. The draft rule language may allow a consumer product to be exempt from the Indiana CCP rule if it has been granted an innovative product exemption or an ACP by the

California Air Resources Board or any air pollution control agency of another state that has adopted a CCP rule substantially equivalent to the OTC model rule (326 IAC 8-15-5 Innovative products exemption and 326 IAC 8-15-6 Alternative control plan). Finally, the VOC content limit for toilet and urinal care products, and the ban on (PDCB), has not been included in Indiana's CCP rule in order to ensure that Indiana's CCP rule is consistent with surrounding states. Neither Ohio or Illinois included the ban of PDCB in solid air fresheners and toilet or urinal care products, and both removed the VOC content limits for toilet and urinal care products.

Comment: The Consumer Specialty Products Association (CSPA) is a voluntary, non-profit national trade association representing approximately 250 companies engaged in the manufacture, formulation, distribution, and sale of products for household, institutional, commercial and industrial use. CSPA member companies manufacture and market more than two-thirds of the broad product categories covered by IDEM's proposed regulation and the OTC's Model Rule. CSPA understands IDEM's need to expeditiously promulgate enforceable regulations to achieve additional reductions in VOC emissions. As a practical matter, eight states' OTC-based final regulations establish January 1, 2009, as the effective date for new VOC standards. Since CSPA member companies already have taken necessary actions to reformulate their products to comply with the January 2009 deadline in these other states, CSPA supports IDEM's proposal to establish July 1, 2010, as the effective date for Indiana's new VOC limits and related regulatory requirements. (CSPA)

Response: IDEM had to complete a fiscal impact analysis for this rulemaking as required under Indiana Code, § 4-22-2-28(c) and (e), which added additional time to the rulemaking schedule, and made IDEM's original proposed implementation date of January 1, 2010 impractical. Therefore, IDEM has amended the implementation date to January 1, 2011.

Comment: CSPA supports the promulgation of the uniform regulations because it is vitally important that interstate commerce is not impaired by the promulgation of different state regulations in the Midwest, Northeast and Mid-Atlantic Regions. Moreover, adoption of uniform regional regulations is a practical necessity for small businesses since they generally lack the staff resources to ensure that the companies products comply with a patchwork of different (and potentially conflicting) state-specific requirements. Therefore, CSPA supports IDEM's proposal to join other states' environmental agencies in developing uniform regulatory requirements for consumer products based upon the OTC model rule. Uniform state regulations will improve air quality without imposing unnecessary impediments to interstate commerce. (CSPA)

Comment: The Personal Care Products Council (PCPC) is the national trade association representing the personal care products industry, representing approximately 600 members involved in the manufacture and distribution of cosmetics, toiletries, and fragrances in Indiana

and throughout the United States. Many of these companies are based in Indiana and/or have significant facilities in the State.

While we have supported efforts by U.S. EPA and environmental authorities in several states to reduce emissions from consumer products as part of their efforts to improve air quality, it is of critical importance that implementing regulations ensure that feasibility of continuing to sell such products across state lines while maintaining consistent quality and safety. In pursuit of this goal, we have worked cooperatively with U.S. EPA, the California Air Resources Board (CARB), the OTC and the growing number of jurisdictions that have taken action to adopt the OTC model rule to ensure the greatest degree of consistency possible among the many jurisdictions.

We commend IDEM on substantially adhering to the revised OTC model rule in this revision. The PCPC worked closely with the OTC on the adoption of both its original regulation and the 2006 updated version. Our support for these efforts stems from the critical need of our members to have state regulations that are both technologically and commercially feasible for compliance and that permit the sale of uniform products across state lines, and we are gratified to note that IDEM appears to have followed the OTC model rule closely. (PCPC)

Response: IDEM understands the importance of consistency for a rulemaking that affects CCPs that are sold nationwide. Ensuring that Indiana's VOC CCP rules are consistent with other LADCO and OTC states has been an important consideration for the department when drafting the rule language.

Comment: The Alliance of Automobile Manufacturers (Alliance) is a coalition of eleven car and light-duty truck manufacturers. Several Alliance members have automobile and light-duty truck assembly plants with surface coating operations as well as other types of facilities that are located in Indiana.

In 1998, U.S. EPA issued a final list of categories of products to be regulated under the Clean Air Act, Section 183(e). The list included consumer products, for which U.S. EPA issued a national rule, as well as auto and light-duty truck assembly coatings. U.S. EPA issued a final Control Techniques Guidelines (CTG) document in October 2008 that specifically addresses VOC emissions from auto and light-duty truck assembly coatings. In addition to primer-surfacer topcoat, and electrodeposition coatings, the final Auto CTG contained VOC limits for glass bonding primer; adhesives; cavity waxes; auto original equipment manufacturing (OEM) sealers/sealants and caulks; deadners; gasket/sealing material; underbody and trunk interior coatings; weatherstrip adhesives; and lubricating waxes and compounds. The Auto CTG also addressed cleaning material used at auto and light-duty truck surface coating and assembly plants.

Our understanding is that the IDEM proposed rule is intended to be analogous to the 1998 U.S. EPA national rule establishing VOC content limits for CCPs and, like U.S. EPA's rule, is intended to apply only to retail products sold to customers for personal and household use and

other products distributed by wholesalers for use in some commercial and institutional settings.

We further understand that the VOC content limits contained in the proposal are not intended to apply to products used at auto and light-duty truck surface coating and assembly facilities or other OEM facilities operated by Alliance members and which would be covered by the 2008 Auto CTG or other federal Section 183(e) rules or CTGs. The Alliance supports this approach and recommends that IDEM issue a final rule clearly stating that the VOC limits for CCPs do not apply to materials covered by the Auto CTG or to products regulated under other national rules or CTGs issued under the Clean Air Act, Section 183(e). (AAM)

Response: An “industrial or institutional product” means the following:

“(A) A consumer product that is designed for use in the maintenance or operation of an establishment that:

- (i) manufactures, transports, or sells goods or commodities or provides services for profit; or
- (ii) is engaged in the nonprofit promotion of a particular public, educational, or charitable cause.

(B) The term does not include household products and products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment...” (326 IAC 8-15-2(96))

The rule does not include products subject to the Auto CTG which are incorporated into or used exclusively in the manufacture or construction of goods or commodities at the facility. Also exempt from this rule are those products used directly in the manufacturing process that do not actually become part of the finished product but are nonetheless essential to the manufacturing process. For example, cleaning, degreasing, and lubricating products may be exempt from the definition of “consumer products” if the manufacturing process is the only use for these products.

Products used at a manufacturing facility that do meet the definition of “consumer products” subject to this rule include products that are used in general cleaning or maintenance of the manufacturing facility. Such products are often similar to commonly available household products and are used to perform tasks (such as cleaning and waxing) that are similar to those performed by a household consumer. Examples of these products include air fresheners, floor waxes, general purpose cleaners, and insecticides.

Comment: The Department’s proposed VOC standards impose very stringent and technologically challenging limitations on the formulation of consumer products. Thus, it is reasonably foreseeable that some manufacturers (most likely small businesses) will experience difficulty complying with the regulatory standards for particular product categories.

CSPA recognizes the fact that the Department’s general air quality regulation contains definitions and provisions that provide the framework for all other sections of the IDEM’s air quality regulations. For example, the general definition of the pivotal term “volatile organic

compound,” as set forth at 326 IAC 1-2-90, applies to the Department’s proposed CCP rule and to other sections of the Indiana Administrative Code that deal with air quality issues.

However, despite our best efforts, CSPA could not identify a similar general provision for considering requests for variances. If there is such a provision, the IDEM should remove any potential confusion by providing an explicit cross-reference to the general variance provision in the final consumer products regulation. In the alternative, if the IDEM’s comprehensive air quality regulation contains no such general variance provision, the Departments’s final regulation should incorporate the narrowly-tailored variance provision contained in the OTC model rule.

As a threshold matter, variances are intended to provide temporary regulatory relief for compliance with an applicable VOC limit. As a practical matter, the entire framework for the Department’s proposed regulation is premised on OTC’s comprehensive model rule. Therefore, it is both reasonable and appropriate for IDEM to provide this necessary procedural mechanism (based on the OTC model rule) for companies to request a variance. This revision will ensure that IDEM’s final regulation is consistent with the OTC model rule and the final regulations promulgated by 12 states.

To ensure greater consistency with the OTC model rule and the final OTC-based regulations promulgated by other states, the Department should amend the current language of Section 3(a) to include an explicit reference to the variance provision. By including the explicit reference to the variance section (either a new section or the existing section of the Department’s general regulation), IDEM’s final regulation will be more consistent with the OTC model rule and other states’ OTC-based regulations. (CSPA)

Comment: The proposed regulation neglects to incorporate the OTC model rule’s provision for variances. IDEM should add the language from section 8 of the OTC model rule permitting variances, or alternatively, a truncated version of this language, such as:

“Consumer products which have been granted a variance by the CARB under the provision of 17 CCR 94514 shall be exempt from the VOC content limits in section 3(a) for the period of time that the variance remains in effect. Any person claiming a variance on this basis must submit to IDEM a copy of the variance decision, including all conditions applicable to the variance, by the date that the product is first marketed in Indiana.” (PCPC)

Response: Indiana’s general variance provisions for environmental rules and standards are found in the Indiana Code § 13-14-8-8. This section applies to all air quality rules contained in Title 326 of the Indiana Administrative Code. Any requests for a variance from 326 IAC 8-15 should be made in accordance with the provisions of Indiana Code § 13-14-8-8. IDEM declines to include specific variance provisions for each individual air quality rule in Title 326.

Comment: First, CSPA strongly supports the Department’s proposal to provide an express exclusion from the labeling requirements (326 IAC 8-15-7) for products regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). It is well-settled law that states

cannot impose “any requirements for labeling or packaging in addition to or different from those required under FIFRA.” While state agencies like IDEM have ample authority to promulgate regulations to protect public health and the environment in Indiana, the U.S. Supreme court has held that states may not adopt requirements that would cause a FIRFA-regulated company to modify a federally approved label. Thus, IDEM’s proposed action is consistent with every state’s final OTC-based consumer products regulation.

However, as currently drafted, Section 4(f) cites an incorrect section of IDEM’s proposed regulation. IDEM should make the following technical correction:

326 IAC 8-15-4 Exemptions

(f) The requirements of section ~~6(a)~~ **7(a)** of this rule shall not apply to consumer products registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136, et seq)

As currently drafted, IDEM’s Alternative Control Plan provision is set forth at Section 6, while the various administrative requirements (including the mandatory labeling requirements) are contained in Section 7. This revision will ensure the accuracy and internal consistency of the Department’s final regulation. (CSPA)

Response: IDEM amended the language at 326 IAC 8-15-4(g) to correct the error in the draft rule language published in the Second Notice of Comment Period.

Comment: The definition of “hairstyling product” deviates from the OTC model rule definition with respect to detanglers/conditioners/volumizers. The OTC model rule definition includes “leave-in volumizers, detanglers, and/or conditioners that make styling claims.” By contrast, the definition in the current proposal includes “detanglers or conditioners, or both and leave-in volumizers that make styling claims.” The definition should track the OTC definition verbatim, else risk sweeping in standard detanglers and conditioners that are not “leave-in.” (PCPA)

Response: IDEM amended the definition for “hairstyling product” at 326 IAC 8-15-2(88) to clarify that the term refers to “leave-in detanglers, conditioners, or volumizers that make styling claims.”

Comment: Section 9(a) of the Draft Rule, states that “testing to determine compliance with the VOC content limits specified in section 3(a) of this rule shall be performed using [certain methods]” but fails to specifically identify the regulated entity which would be responsible for compliance with those testing requirements. This provision should be revised to state that it is the responsibility of the manufacturer or the responsible party to conduct testing to determine the VOC content of a given consumer product. (SH)

Response: IDEM amended the draft rule language in section 9(a) to clarify that the manufacturer or responsible party is responsible to conduct testing to determine the VOC content of a CCP that is subject to the rule.

Comment: In order to clarify that the definition of “manufacturer” does not encompass a retailer who, for example boxes an existing consumer product (without altering the label) for shipment to its customer, we request that definitions be added to Section 2 of the draft rule for the terms “package” and “repackage.” The definitions should state that those terms refer to the placement or replacement of a consumer product in an individual receptacle that holds the product for sale or distribution. *C.f.*, 40 C.F.R. § 59.401 (Definitions, National VOC Emission Standards for Architectural Coatings) (SH)

Response: IDEM reviewed the definitions in the VOC CCP rules of the OTC states’, Illinois, Ohio, and Michigan. The definition of “manufacturer” in Indiana’s draft rule is consistent with the definition used in those states’ CCP rules. Additionally, these states do not include a definition for “package” or “repackage”. The Code of Federal Regulations citation that references is for the national rule for architectural coatings and not the federal rule for CCPs. IDEM has not amended the draft rule language to include the requested definitions.

Throughout this rulemaking, IDEM has closely adhered to the rule language in the OTC model rule to ensure that Indiana’s CCP rule is consistent with other states’ rules. Ensuring that regulations such as this one--that affects commerce at both a national and regional level--is consistent with other states is a priority. After reviewing other states’ effective CCP rules, IDEM believes that it would be inconsistent to limit the definition of manufacturer as requested.

Comment: Unlike a manufacturer, a business that is engaged only in the retail sale of consumer products is frequently not in a position to know whether a given product actually comports with all applicable content limits. With that in mind, several states that have adopted VOC emission standards for consumer products have included an exemption for retailers who make “good faith efforts” to comply with those requirements. For example, Maryland regulations provide that a retailer who sells a consumer product that exceeds applicable VOC content limits will not be in violation of Maryland regulations if the retailer can demonstrate that, when the retailer purchased the product from the supplier, the retailer made “reasonable good faith efforts” to assure that the product met applicable content-related requirements. Maryland regulations list several types of documentation which may constitute evidence of a retailer’s “good faith efforts”. Delaware and New Jersey have also incorporated similar provisions into their consumer product regulations. The draft rule should be revised to provide an exemption for retailers who have made good faith efforts to comply with applicable standards. (SH)

Response: IDEM agrees that a business engaged only in the retail sale of CCPs subject to this rule is primarily reliant on the representations made by a manufacturer or responsible party that a CCP is compliant. After reviewing the exemption rule language that Delaware, Maryland, and New Jersey provide for retailers that have made “reasonable good faith efforts” to assure that the product met the applicable VOC content-related requirements, IDEM has amended the draft

rule language at 326 IAC 8-15-4(d) to include an exemption for retailers. This exemption is applicable only to retailers which can demonstrate to the department that they made a “reasonable good faith effort” to assure that the product, at the time of purchase, met the applicable VOC content limit requirements.

Comment: The proposed rule requires that an explanation of the date code be submitted to IDEM by January 1, 2010, six months prior to the rule’s effective date. Although this provision is loosely based on the OTC model rule, we note that a number of other jurisdictions have revised their rules to require such explanations only upon the request of the agency, and ask that Indiana do the same. Furnishing date code explanations only on request would minimize the regulatory burden on companies, while accomplishing the same goal. (PCPC)

Response: IDEM has amended the date to January 1, 2011. The draft rule language at 326 IAC 8-15-7(b) requires manufacturers to submit an explanation of the date portion of the code to the department no later than January 1, 2011. This requirement is pulled directly from the OTC model rule’s section 6(b), administrative requirements. After reviewing other jurisdictions VOC CCP rules, it appears that a majority of states follow the OTC model rule requirements that are embodied in IDEM’s draft rule language. Therefore, to ensure consistency with the OTC model rule language, IDEM will require manufacturers to submit explanations of their date codes to the department.